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Nos. 04-900 and 04-903

In the Supreme Court of the United States

BP WEST COAST PRODUCTS LLC, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

SFPP, L.P., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CYNTHIA A. MARLETTE
General Counsel

DENNIS LANE
Solicitor

LONA T. PERRY
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTIONS PRESENTED

1. Whether an Oil Pipeline Board investigation of existing pipeline rates under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. App. 15(7), was properly vacated on the ground that Section 15(7) applies only to newly filed rates.

2. Whether the Federal Energy Regulatory Commission has statutory authority to enter interim rate orders during the pendency of a rate proceeding.

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No. 04-900

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (04-903 Pet. App. 1a-79a[1]) is reported at 374 F.3d 1263. The opinions of the Federal Energy Regulatory Commission (Pet. App. 91a-231a, 232a-242a; 04-903 Pet. App. 107a-112a, 113a-128a, 129a-135a, 136a-138a, 139a-147a) are reported at

[1] All reference to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 04-900, unless otherwise indicated.

86 F.E.R.C. ¶ 61,022, 63 F.E.R.C. ¶ 61,014, 91 F.E.R.C. ¶ 61,135, 96 F.E.R.C. ¶ 61,281, 97 F.E.R.C. ¶ 61,138, 98 F.E.R.C. ¶ 61,177 and 100 F.E.R.C. ¶ 61,353.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2004. Petitions for rehearing were denied on October 4, 2004. The petition for a writ of certiorari in No. 04-900 was filed on December 30, 2004, and the petition for a writ of certiorari in No. 04-903 was filed on January 3, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases involve the court of appeals' affirmance in relevant respects of the results of an extensive proceeding before the Federal Energy Regulatory Commission to establish a methodology for determining oil pipeline rates and to apply that methodology to two pipelines.

1. Although the Interstate Commerce Act was largely repealed in 1978, see Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b) and (c), 92 Stat. 1466, 1470, the Federal Energy Regulatory Commission was entrusted with "the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission." 49 U.S.C. 60502. The basic mandate of the Interstate Commerce Act is that "charges made for any service rendered * * * in the transportation of" property must be "just and reasonable," and "every unjust and unreasonable charge for such service or any

part thereof is prohibited and declared to be unlawful." 49 U.S.C. App. 1(5).[2]

Under Section 13(1) of the Act, "[a]ny person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention thereof, may apply to [FERC] by petition," and "[i]f * * * there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of." 49 U.S.C. App. 13(1). Thus, a shipper, for example, may file a complaint under Section 13(1) against a carrier, claiming that an existing rate is not just and reasonable.

With respect to newly filed rates, Section 15(7) provides that "[w]henever there shall be filed with the Commission any schedule stating a new individual or joint rate," the Commission "may * * * suspend the operation of such schedule and defer the use of such rate" for up to seven months while it investigates the lawfulness of the rate. 49 U.S.C. App. 15(7). A party who objects to a newly filed rate and seeks to have the Commission open an investigation under Section 15(7) is commonly said to file a "protest," as opposed to a "complaint" under Section 13(1). After determining the lawfulness of the new rate, "the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective." 49 U.S.C. App. 15(7).

Two remedial provisions of the Act are of relevance here. Section 16(1) authorizes the Commission to award damages following a hearing on a complaint made under

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[2] All citations to the Interstate Commerce Act are to the 1988 edition of the United States Code, which was the last to include the relevant 1977 provisions.

Section 13. 49 U.S.C. App. 16(1). Section 15(1) provides that, if the Commission determines that any rate "is or will be unjust or unreasonable * * *, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed." 49 U.S.C. App. 15(1).

In 1992, Congress enacted the Energy Policy Act of 1992 (EPAct), Pub. L. No. 102-486, 106 Stat. 2776. Section 1803(a)(2) (106 Stat. 3011) provides that any oil pipeline rate that was in effect for a full year before the enactment of the EPAct on October 24, 1992, "shall be deemed to be just and reasonable" under the Interstate Commerce Act if that rate "has not been subject to protest, investigation, or complaint during such 365-day period." See Pet. App. 8a. Such rates are immune to challenge under Section 13(1) of the Interstate Commerce Act. Thus, rates that were filed and not challenged during the year prior to October 24, 1992 are "grandfathered." There are limited exceptions to such "grandfathered" status where (1) "a substantial change has occurred after" October 24, 1992, "in the economic circumstances of the oil pipeline which were a basis for the rate or in the nature of the services provided which were a basis for the rate" or (2) "the person filing the complaint was under a contractual prohibition against the filing of a complaint" on October 24, 1992. EPAct § 1803(b), 106 Stat. 3011.

2. These petitions arise from proceedings concerning certain tariffs filed by SPFF for oil transported through SFPP's East Line and West Line. The West Line extends from Los Angeles to Phoenix and Tucson and connects with another pipeline that extends to Las Vegas. The East Line extends from El Paso, Texas, to Phoenix and Tucson. Pet. App. 7a. SPFF originally

filed the tariffs in 1992. *Id.* at 10a. Subsequent, lengthy proceedings before the Commission were occasioned by the tariff filings, numerous protests and complaints by differing groups of shippers, and motions for reconsideration by SFPP and shippers. Those proceedings were also exceptionally complex, because they presented the first opportunity for the Commission to address various new standards under the EPAct. *Id.* at 7a-8a.

3. *West Line rates.*

a. On July 31, 1992, SFPP filed revisions to its FERC Tariff Nos. 15, 16 and 17. The sole effect those revisions had on the West Line was to add a new origination point at East Hynes in Los Angeles County, California, and provide a rate for service from that point. Pet. App. 10a, 237a. Notwithstanding the limited nature of the change proposed, SFPP filed entirely new tariffs that also restated SFPP's existing rates for both the West and East Lines. It is the custom in the oil pipeline industry to file a new tariff rather than to file supplements or changes to existing tariffs. *Id.* at 110a.

In September 1992, El Paso Refinery, an East Line shipper, filed protests to SFPP's tariffs. Pet. App. 18a. The same month Chevron, which ships on both the East and West Lines, filed a protest to the tariffs. *Ibid.* Both protests sought the suspension of the tariffs and the commencement of an investigation by the Oil Pipeline Board. As relevant here, FERC had delegated authority to the Oil Pipeline Board to "[a]ct on all matters arising out of Section 15(7) of the Interstate Commerce Act," including the suspension of rates and the institution of investigations under Section 15(7). 18 C.F.R. 375.306 (1993); *Organization of the Commission; Establishment of Oil Pipeline Board; Delegation of Authority to Oil Pipeline Board*, [Regs. Preambles 1977-1981]

Fed. Energy Guidelines-FERC Stats. & Regs. ¶ 30,007 (1978).[3] The Board did not, however, have authority to make a final decision on whether a rate is lawful. See *ibid.* On September 29, 1992, pursuant to those protests, the Board opened an investigation under Section 15(7) of Tariffs Nos. 15, 16, and 17, suspended the rates for one day, and imposed refund obligations on SFPP. Pet. App. 20a.

b. In an order issued on April 2, 1993, the Commission concluded that the Board did not have authority to open a rate investigation under Section 15(7). Pet. App. 232a-242a. Section 15(7) authorizes only an investigation of "any schedule stating any *new* individual or joint rate." 49 U.S.C. App. 15(7) (emphasis added). With respect to the West Line, the Commission found that "[n]either El Paso nor Chevron specifically protested the addition of the East Hynes origination point or the rate for service from that point, and neither protestant presented any material indicating it had an economic interest in these changes," which, as noted, were the only changes made by the new tariffs. Pet. App. 234a. The Commission further found that, even with respect to the East Line, the El Paso and Chevron complaints "disputed certain *existing* practices that the pipeline did not propose to change." *Id.* at 238a (emphasis added). The Commission accordingly found that the Board erred in invoking the Section 15(7) procedures, because "[i]t was not appropriate for the Board to suspend the proposed tariff changes and initiate an investigation under section 15(7) when the focus of the protest was existing, unchanged, portions of the tariff." *Id.* at

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[3] The Commission revoked the delegation and abolished the Oil Pipeline Board in 1993. See 58 Fed. Reg. 58,769-58,770 (1993).

239a. The Commission accordingly vacated the Board's suspension and imposition of refund obligations. *Id.* at 242a.

In two later decisions, the Commission made explicit the consequences under Section 1803(a) of the EPAct of its holding that the Board had no authority to commence an investigation under Section 15(7). Section 1803(a) grandfathers rates that were not "subject to protest, investigation, or complaint" during the one-year period prior to October 24, 1992. In an order issued on October 5, 1993, the Commission repeated its conclusion that "[n]othing within the four corners of [the Chevron and El Paso] protests indicates a concern with the existing rates on SFPP's west line." *SFPP, L.P.*, 65 F.E.R.C. ¶ 61,028, at 61,378 (1993). Accordingly, the Commission concluded that "the west line rates set forth in SFPP's tariffs nos. 15, 16, & 17 * * * are presumed just and reasonable under section 1803(a) of [the EPAct]." *Id.* at 61,379. On rehearing, FERC rejected Chevron's contention that, even if the West Line rates had not been "subject to protest * * * or complaint" within the meaning of Section 1803(a) of the EPAct, they were "subject to * * * investigation" by the Oil Pipeline Board within the meaning of that provision. The Commission found that "the existing rates on SFPP's west line were not subject to investigation—lawfully instituted or otherwise—during the statutory 365-day period," because "[n]either the protests, nor the Board's suspension orders, specifically implicated the lawfulness of the existing rates on SFPP's west line." *SFPP, L.P.*, 66 F.E.R.C. ¶ 61,210, at 61,480 (1994).

c. Petitioners in No. 04-900 (collectively, the West Line shippers) petitioned for review in the court of appeals of the Commission's determination that the West

Line rates were grandfathered. They argued that the rates had in fact been "subject to protest, investigation, or complaint" during the one-year period before October 24, 1992.

The court of appeals affirmed the Commission's finding that the West Line rates were not "subject to protest * * * or complaint," holding "that FERC reasonably determined that the West Line rates * * * were grandfathered and therefore deemed just and reasonable under the terms of Section 1803(a) of the EPAct." Pet. App. 22a. The court noted that "[t]he [El Paso] and Chevron pleadings scarcely mention the West Line at all, let alone mount an attack on the reasonableness of its rates." *Id.* at 18a. The court accordingly held that "[t]he Commission * * * reasonably concluded that the[] protests by [El Paso and Chevron] were insufficient to render the West Line rates 'subject to protest'" under Section 1803(a) of the EPAct. *Id.* at 19a.

The West Line Shippers also argued that, because the Commission did not formally order the Oil Pipeline Board's investigation of the tariffs to be vacated, the rates in those tariffs in any event remained "subject to * * * investigation" in 1992, within the meaning of Section 1803(a). The court affirmed the Commission on that point as well. The court noted that, although the Commission had not formally vacated the Board's investigation, it had expressly stated that "[i]t was not appropriate for The Board to suspend the proposed tariff changes and initiate an investigation." *SFPP, L.P.*, 63 F.E.R.C. ¶ 61,014, at 61,125 (1993). The court held that statement to be sufficient to establish that there was no valid "investigation" during the one-year period prior to October 24, 1992, and that the rates therefore were properly grandfathered under Section 1803(a) of the

EPAct. Pet. App. 21a. The court also found that, "even if common sense bowed to formalism and the Board's investigation remained technically open, the scope of the Board's investigation—lawful only insofar as it enforces * * * Section 15(7)—must be limited to newly tariffed rates or practices." *Id.* at 21a-22a. Because the new tariffs made no relevant changes to West Line rates, "the Board could not have investigated the West Line rates." *Id.* at 22a.

4. *East Line Rates.*

a. In the April 2, 1993, order in which the Commission had vacated the suspension and refund obligations imposed by the Oil Pipeline Board, the Commission also found that, because the Chevron and El Paso protests were directed at existing, not new, East Line rates, they should proceed as complaints under Section 13(1) of the Interstate Commerce Act, rather than as protests under Section 15(7) of the Act. Pet. App. 239a. On January 13, 1999, the Commission filed Opinion No. 435 (Pet. App. 91a-231a), which addressed certain aspects of those complaints. The Commission found that the East Line rates "may not be just and reasonable." *Id.* at 230a; see also *id.* at 229a ("[S]ome of the theories with which SFPP has sought to defend its East Line rates were not justified on this record."). The Commission ordered SFPP to make a "compliance filing" adjusting its rates reflecting certain changes to the rates required by the Order. *Id.* at 230a. The Commission stated that, if, upon review of the compliance filing, the "East Line rates are determined to be just and reasonable," the complaints would be dismissed. *Ibid.* The Commission stated that, alternatively, "[i]f the East Line rates are determined not to be just and reasonable * * * , the Commission will determine at a later date whether reparations should be

made." *Ibid.* The Commission also left open the possibility of still higher SFPP rates, noting that, "if SFPP believes that any revisions to its East Line rates that may result from this order are too low to recover its costs * * * , it may make a filing to raise the rates to a higher level at the time it makes its compliance filing." *Id.* at 229a-230a.

SFPP filed Tariff No. 43 in compliance with Opinion No. 435. 04-903 Pet. App. 102a. On April 14, 1999, FERC accepted and suspended that tariff filing subject to refund. *Ibid.* FERC found that, "because of the ongoing investigation and review of the proposed rates in the compliance filing, the proposed tariff rates in both tariffs in the instant filing cannot be determined to be just and reasonable until review of the compliance filing in Docket No. OR92-8-001, *et al.*, is complete"—*i.e*, until the Commission had completed its review of SFPP's East Line rates. *Id.* at 105a. Subsequent FERC orders similarly required further compliance filings and reparations, as issues in the rate proceedings were resolved. See Pet. App. 73a-74a. In those orders, FERC repeatedly made clear that it was not coming to a final determination of whether the rates in the filings were just and reasonable and that any such determination would have to await the final termination of the complex proceedings.[4] FERC explained that final

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[4] See Pet. App. 74a-75a; 04-903 Pet. App. 112a ("At the time Tariff No. 43 was filed there was a significant chance that the rate levels in the tariff would change depending on how the protests and related requests for rehearing were resolved."); *id.* at 137a ("SFPP has been directed only to make a further compliance filing, and thus no final rate has been determined in this case."); *id.* at 143a ("[T]he first purpose of the various opinions issued in this proceeding is to arrive at the correct methodology for establishing oil pipeline rates," and "none of the prior

Commission action establishing a rate "cannot occur under a situation [where] the Commission has expressly reserved its authority in the context of an ongoing proceeding in which the methodology for determining the rate had not even been established." 04-903 Pet. App. 146a.

The Commission ordered SFPP to pay reparations to shippers, based on the differences between the rates in the compliance filings and the rates ultimately determined to be lawful. See 04-903 Pet. App. 127a-128a, 147a. Because none of its decisions during the course of the proceeding had finally determined the lawful East Line rate, the Commission rejected SFPP's argument that, under this Court's decision in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370 (1932), the tariffs in the compliance filings should be deemed final and beyond the authority of the Commission to modify. See, *e.g.*, 04-903 Pet. App. 137a, 142a-146a. In *SFPP, L.P.*, 102 F.E.R.C. ¶ 61,073 (2003), FERC finally accepted SFPP's revised compliance filing, with one exception not relevant here.

b. SFPP petitioned for review of FERC's determination that it had authority to order reparations based on the difference between the rates in SFPP's compliance filings and the rate ultimately determined to be lawful. See Pet. App. 72a, 75a-76a. The court of appeals rejected SFPP's argument that FERC had no authority under *Arizona Grocery* to order reparations after requiring SFPP to make the various compliance filings. Pet. App. 72a-76a. The court explained that *Arizona Grocery* "bars reparations that retroactively

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opinions or orders in these proceedings have established a final, specific rate level that SFPP should include in any final and definitive compliance filing.").

change a final Commission-approved rate." *Id.* at 72a. It applies "only where the Commission has 'declared what is the maximum reasonable rate to be charged by a carrier.'" *Id.* at 73a (quoting *Arizona Grocery*, 284 U.S. at 390). The court found that in this case, "FERC did not finalize a maximum reasonable rate in Opinion No. 435 and in fact repeatedly stated it was not doing so." *Ibid.* Instead, "FERC only established a final rate at the completion of the OR92-8 proceedings." *Ibid.* The court found that "[t]he Commission has thus been clear from the outset and throughout that no final rate determination would be made until the OR92-8 proceedings were complete." *Id.* at 75a. The court concluded that "the Commission's orders requiring reparations do not violate the prohibition in *Arizona Grocery* from subjecting a carrier to payment of reparations with respect to a final rate." *Ibid.*

The court also rejected SFPP's contention that FERC lacks statutory authority to issue "interim" rates while a complaint proceeding is ongoing. Pet. App. 75a. The court explained that "nothing in Section 15(1) prohibits FERC from directing a pipeline to file an interim rate, subject to suspension and refund, if there is a possibility that the final rates will be lower than the interim rates." *Ibid.* The court noted that this Court in *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), had specifically held that the Commission "had authority—in response to an initial filing—to direct an oil pipeline to file interim rates to go into effect, subject to refund, during the suspension period for the initial rates." Pet. App. 75a (also citing *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 146 (1962), and *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)).

ARGUMENT

The decision of the court of appeals affirming the Commission's determination that the West Line rates were grandfathered under Section 1803(a) of the EPAct and the Commission's determination that it had authority to award reparations with respect to the East Line rates is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. *Grandfathering of West Line rates.*

Under Section 1803(a) of the EPAct, a rate "shall be deemed to be just and reasonable" under the Interstate Commerce Act if that rate "has not been subject to protest, investigation, or complaint during [the] 365-day period" preceding October 24, 1992. Petitioners do not challenge the conclusion of the Commission and the court of appeals that the West Line rates were not subject to "protest * * * or complaint" during the one-year period. They contend, however, that the West Line rates were "subject to * * * investigation" by the Oil Pipeline Board during that period. They contend, on that basis, that the West Line rates are not "deemed to be just and reasonable" under Section 1803(a). That contention is mistaken.

a. Section 15(7) of the Interstate Commerce Act provides that "[w]henever there shall be filed with the Commission any schedule stating a *new* individual or joint rate, fare, or charge * * * , the Commission shall have * * * authority * * * to enter upon a hearing concerning the lawfulness of such rate, fare [or] charge." 49 U.S.C. App. 15(7) (emphasis added). See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 642 (1978) ("§ 15(7) applies to *any* new rate"). The Commission found that

the tariffs at issue in this case merely restated SFPP's existing West Line rates. See Pet. App. 237a. The court of appeals agreed, *id.* at 10a-11a, and petitioners expressly waive any argument to the contrary. 04-900 Pet. 3 n.1. In light of the fact that only existing—and not new—rates were at issue in this case, the court of appeals affirmed the Commission's conclusion that the Oil Pipeline Board had no authority to launch an investigation of those rates under Section 15(7). As the court explained, "the scope of the Board's investigation—lawful only insofar as it enforces ICA Section 15(7)—must be limited to newly tariffed rates or practices. As SFPP's tariffs made no changes to the West Line rates * * * , the Board could not have investigated the West Line rates." Pet. App. 21a-22a (citation omitted). Although the Board purported to launch a Section 15(7) investigation, the Board's lack of authority rendered that effort invalid and ineffective.

b. Petitioners' primary contention (04-900 Pet. 9-14) is that the court of appeals' conclusion that Section 15(7) does not authorize an investigation of existing rates conflicts with *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949). *Ayrshire* arose from two proceedings, one of which involved a complaint challenging existing rates and the other of which involved a challenge to a proposal by certain carriers to increase some of those same rates. *Id.* at 577. The Interstate Commerce Commission "found that present and proposed rates * * * would result in unjust discrimination * * * and undue preference and prejudice," and it accordingly "went on to specify rates which it approved." *Id.* at 580.

The carriers argued in this Court that the ICC had authority only to determine the lawfulness of—*i.e.* to accept or reject—the proposed rates, and not to put a

new rate in their place. *Ayrshire*, 335 U.S. at 582. This Court rejected that argument. The Court noted that Section 15(7) authorizes the ICC, in determining "the lawfulness of any new rate," to "make such order with reference thereto as would be proper in a proceeding initiated after it had become effective." *Id.* at 581-582 (quoting Section 15(7)). The Court also noted that, if the Commission finds an existing rate to be unlawful, "the Commission is granted the power under § 15(1) to determine and prescribe the just and reasonable rate." *Id.* at 583. Therefore, because Section 15(7) authorizes the Commission to issue orders with respect to new rates that the Commission could issue with respect to existing rates, and because Section 15(1) authorizes the Commission to put a new rate in place if it finds an existing rate unlawful, the combination of the two provisions authorizes the Commission to set a rate to be used if it finds a proposed new rate unlawful. As the Court concluded, "[t]he Commission is not bound either to approve or disapprove *in toto* the new rates that are proposed," but instead "can modify the proposal in any respect and require that the proposed rates as modified or wholly different rates be substituted for the present ones." *Ibid.* See, *e.g.*, *Tennessee Gas Pipeline Co.* v. *FERC*, 860 F.2d 446, 454-455 (D.C. Cir. 1988) (same under Natural Gas Act).

Ayrshire thus establishes that, if a carrier proposes a new rate, the Commission may find it unlawful after an investigation under Section 15(7) and the Commission may then itself set a new rate pursuant to its authority under Section 15(1). In this case, however, there was no new rate proposed. The court of appeals' holding that Section 15(7) itself does not authorize an

investigation of existing rates is fully consistent with that portion of the decision in *Ayrshire*.

One brief portion of the Court's opinion in *Ayrshire* addresses the validity of the Commission's prescription of new rates for a service on which the carrier had filed a tariff that merely restated its present rates and proposed no changes. 335 U.S. at 583. The Court affirmed the authority of the Commission to set new rates even for that service, stating that the restated rates

> were among the rates suspended by the Commission. And the Commission's order of investigation cited the Milwaukee tariff that contains those rates. Hence the Commission sought to bring them into the investigation and gave Milwaukee all the notice to which it was entitled. That the Commission had authority to include them seems clear to us. Even though we assume they are not 'new' rates within the meaning of § 15(7), they are rates 'demanded, charged, or collected' within the meaning of § 15(1).

Ibid. Petitioners argue (04-900 Pet. 13) that this passage "controls on the point that a Section 15(7) investigation did and does encompass jurisdiction to review existing refiled rates."

Petitioners are mistaken. Although the quoted passage from *Ayrshire* is not entirely clear, the Court appears to have been of the view that the restated rates did not come within the Commission's Section 15(7) investigation authority because they were not "new." That reading is consistent with the Court's earlier recognition in *Ayrshire* that Section 15(7) "gives the Commission broad authority * * * to investigate and determine the lawfulness of any *new* rate." 335 U.S. at 581 (emphasis added). To be sure, the Court in *Ayr-*

shire did go on to uphold the Commission's authority to bring the refiled existing rate into the proceeding, find it unlawful, and order a new rate for that service. But the concluding sentence in the passage quoted above indicates that the Court believed the Commission's authority to do so stemmed from Section 15(1), not Section 15(7).

In sum, *Ayrshire* does not stand for the proposition that Section 15(7), which expressly applies only to "new" rates, must be read to authorize an investigation of existing rates merely because they are refiled in a new tariff. Rather, as explained above, *Ayrshire* supports the conclusion of FERC, sustained by the court of appeals, that Section 15(7) governs the review of new rates, while Section 15(1) governs the review of existing rates. As the court of appeals held, because SFPP did not seek to change its West Line rates, FERC reasonably concluded that the Board's investigation of the West Line rates was not authorized by Section 15(7). Pet. App. 22a.

Contrary to petitioners' contention (04-900 Pet. 2, 16), the result in this case is not an "abdicat[ion]" of FERC's authority to review existing rates. Section 15(1) continues to give FERC full authority, upon complaint or on its own initiative, to determine whether existing pipeline rates are just and reasonable, and to prescribe just and reasonable rates if they are not. FERC, however, delegated only its authority under Section 15(7) to the Board, not its authority under Section 15(1). Accordingly, the court of appeals correctly concluded that the Board had no authority to conduct an investigation of the West Line rates.

c. Petitioners contend (04-900 Pet. 17) that FERC's ruling contravenes the intent of Congress, expressed in

both Section 1(5) of the Interstate Commerce Act and Section 1801(a) of the EPAct, that all rates be just and reasonable. Petitioners are mistaken.

Section 1803(a) of the EPAct provides, with exceptions not applicable here, that a rate "shall be deemed to be just and reasonable" under the Interstate Commerce Act if that rate "has not been subject to protest, investigation, or complaint during th[e] 365-day period" ending in 1992. Section 1803 was enacted to "reduce costs, delays, and uncertainties" in setting oil pipeline rates. *Association of Oil Pipe Lines* v. *FERC*, 83 F.3d 1424, 1429 (D.C. Cir. 1996) (citing H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 1, at 225 (1992)). The point of Section 1803 and accompanying provisions was to:

> ensure that rates that have been in place prior to enactment of [the EPAct] are not exposed to arbitrary review, further reducing legal and administrative costs for oil pipelines and the Federal Government. Many of the rates at FERC have evolved over a 20-year period. Without a just and reasonable definition, all of these rates would be subject to constant review and exposed to a legal challenge at any time.

138 Cong. Rec. 12,035 (1992) (statement of Rep. Brewster). See *id.* at 12,721 (statement of Rep. Synar) ("[T]he provision incorporates a transition mechanism for existing base rates, so that we can avoid thousands of unchallenged rates being unnecessarily subject to question under a new methodology.")

As explained above, the Commission and the court of appeals correctly determined that the West Line rates at issue in this case were properly grandfathered under Section 1803(a) of the EPAct. That determination is

consistent both with the EPAct and Section 1(5) of the Interstate Commerce Act. See *Association of Oil Pipe Lines*, 83 F.3d at 1145 ("[T]he Commission's scheme complies with § 1(5)'s requirement of 'just and reasonable rates' because the 'grandfathered' rates are by definition 'just and reasonable' except for the specific exceptions in EPAct § 1803(b).").

2. *Reparations on East Line.*

a. Although the Commission required SFPP to submit a series of compliance filings and to bring its rates into accord with various Commission rulings during the pendency of the rate proceedings, the Commission never determined that any particular new rate would be "just and reasonable," and it never during that time made a final determination that SFPP must charge a particular rate on its East Line. As the court of appeals recognized after a careful review of each of the Commission orders, "[t]he Commission has * * * been clear from the outset and throughout that no final rate determination would be made until the * * * proceedings were complete." Pet. App. 75a; see *ibid.* (no final rate "where [the Commission] has expressly reserved authority to make adjustments in the context of an ongoing proceeding in which the methodology for determining the rate had not even been established").

This Court has recognized the Commission's authority to require rates to conform to an interim standard pending the completion of a rate proceeding. As the court of appeals noted, this Court "has held that under the ICA the Commission has authority—in response to an initial rate filing—to direct an oil pipeline to file interim rates to go into effect, subject to refund, during the suspension period for the initial rates." Pet. App. 75a (citing *Trans Alaska Pipeline Rate Cases*, 436 U.S.

at 654-656). *Trans Alaska* held that, because "[e]ven a cursory glance at the pleadings before the Commission shows that extended adjudicatory proceedings will be required to resolve the question of precisely what are fair rates," the authority to issue interim rate orders, subject to refund, is "a necessary and 'directly related' means of discharging the Commission's * * * mandate to protect the public pending a more complete determination of the reasonableness of the TAPS rates." *Id.* at 655 (quoting *United States* v. *Chesapeake & Ohio Ry.*, 426 U.S. 500, 514 (1976)). Such authority is necessary "to strike a proper balance between the interests of carriers and the public," and the Court therefore concluded that "the Interstate Commerce Act should be construed to confer on the Commission the authority to enter on this course unless language in the Act plainly requires a contrary result." *Id.* at 655-656. The Court found that the Act did not resolve the question, and it accordingly affirmed the Commission's authority to set interim rates.

Even before *Trans Alaska*, this Court had recognized the validity of interim rate orders. *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), arose from a challenge to a new rate brought under Section 5 of the Natural Gas Act, 15 U.S.C. 717d, which was modeled on Sections 13 and 15 of the Interstate Commerce Act. See 315 U.S. at 584. As does Section 15 of the Interstate Commerce Act, Section 5 of the Natural Gas Act authorizes the Commission, acting on a complaint or its own motion, upon finding existing rates unjust and unreasonable, to set the just and reasonable rates to be "thereafter observed." 15 U.S.C. 717d(a). In *Natural Gas Pipeline*, the Commission had required a rate reduction pending completion of the rate proceeding, and

the pipelines argued that the Commission had no authority to require such a reduction prior to determining the just and reasonable rate. See 315 U.S. at 583. The Court rejected that argument, concluding that Section 5 of the Natural Gas Act "contemplates that, when existing rates are found to be unjust and unreasonable, an order decreasing revenues may be filed without establishing a specific schedule of rates," and that such an order "may be in the interests of the public, as well as the regulated company, and is in harmony with the purposes of the Act." *Id.* at 585.

FPC v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), similarly recognized that the Commission's authority to issue interim rate orders "is well established," *id.* at 150, and found that authority applicable to Commission review of pipeline-filed rates under Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e). In that case, the Commission disallowed an unjust and unreasonable rate of return and required the pipeline to charge lower rates retroactive to the effective date of the increased rates and to pay refunds, even though issues concerning the cost of service and allocation of rates among zones were still pending. *Id.* at 148-149. This Court upheld the Commission's order, finding that, "[f]aced with the finding that the rate of return was excessive, the Commission acted properly within its statutory power in issuing the interim order of reduction and refund, since the purpose of the Act is 'to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.'" *Id.* at 154 (quoting *Atlantic Refining Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 388 (1959)).

Although this case involves a challenge to existing—not new—rates, the rule in *Trans Alaska, Natural Gas*

Pipeline, and *Tennessee Gas* applies here as well. The Commission found in 1999 that SFPP's East Line rates were not just and reasonable. See Pet. App. 230a. As in *Trans Alaska*, it was clear at that point that "extended adjudicatory proceedings" would be necessary to determine the lawful rates. *Trans Alaska*, 436 U.S. at 655.[5] Accordingly, as in *Trans Alaska*, the Commission's obligation "to strike a proper balance between the interests of carriers and the public" justified the Commission in requiring interim rate filings, *ibid.*, without committing the Commission to a final determination of the just and reasonable rate before the proceedings were completed.[6]

b. SFPP's primary contention (04-903 Pet. 10-14) is that the court of appeals' decision is inconsistent with this Court's decision in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370 (1932). That contention is mistaken.

In *Arizona Grocery*, the ICC, acting on shipper complaints, established a final just and reasonable rate for sugar shipments. 284 U.S. at 381. Some years later, after new complaints were filed, the ICC decided that the rate it had established was not just and reasonable,

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[5] Indeed, interim rate relief for shippers was appropriate in this case "in part because of the numerous objections to the prior orders by SFPP itself and the technical problems in SFPP's compliance filings, some of which involved clear over-reaching." 04-903 Pet. App. 145a.

[6] SFPP argues (04-903 Pet. 15) that, because Section 15(1) authorizes the Commission, upon a finding that a rate is not just and reasonable, to determine "the just and reasonable rate * * * to be thereafter observed," it does not give FERC the authority to require an interim rate. This Court, however, upheld the Commission's authority in *Trans Alaska* to issue interim rate orders under Section 15(1) and under the similar statutes at issue in *Natural Gas Pipeline* and *Tennessee Gas*.

and the ICC awarded reparations retroactive to the date the first complaints were decided. *Ibid.* This Court found that the ICC had no authority to order reparations for the carrier's compliance with what the ICC had previously set as the just and reasonable rate. *Id.* at 389. "As respects its future conduct the carrier is entitled to rely upon the [ICC's] declaration as to what will be a lawful, that is, a reasonable rate." *Ibid.* The Court explained:

> Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

Id. at 390.

As the court of appeals recognized, *Arizona Grocery* "bars reparations that retroactively change a final Commission-approved rate," Pet. App. 72a, but it "applies only where the Commission has 'declared what is the maximum reasonable rate to be charged by a carrier.'" *Id.* at 73a (quoting *Arizona Grocery*, 284 U.S. at 390). In this case, because FERC did not declare the final just and reasonable rate until the conclusion of the OR92-8 proceedings, the interim orders issued by FERC do not implicate the *Arizona Grocery* rule.

SFPP erroneously contends (04-903 Pet. 11) that the Court in *Arizona Grocery* rejected an argument by the

ICC that its original rate "was only tentative" and therefore subject to reopening and to a retroactive award of reparations. The ICC did state in the decision under review in *Arizona Grocery* that the ICC "reserve[s] the right * * * to modify [its] previous findings, whether in the same or a previous case." *Traffic Bureau of Phoenix Chamber of Commerce* v. *Atchison, T. & S.F. Ry.*, 140 I.C.C. 171, 180 (1928). But that amounted at most to a general claim that the ICC always retained the right to order retroactive reparations when it determined that rates prescribed in a previous proceeding were in fact unreasonable. The Court rejected that claim in *Arizona Grocery*. But, because the prescribed rate was the result of a final, concluded ratemaking proceeding in *Arizona Grocery*, the ICC could not have advanced—and this Court did not reject—the proposition on which FERC's decision is based here: that during the pendency of a single proceeding, the Commission may require the filing of an interim rate, subject to a reparations order if the final rate is determined to be lower than the interim one.

SFPP contends that the decision in this case "severely undermine[s] the repose and fairness that Congress embodied in the [Interstate Commerce Act]," 04-903 Pet. 17, and argues that it has "an interest in being able to rely upon agency determinations," *id.* at 21. While the shipper in *Arizona Grocery* had an interest in relying on the ICC's final determination of a just and reasonable rate in the earlier proceeding, SFPP has no comparable interest here, because FERC never made a determination of a just and reasonable rate at the time of the interim rate orders; such a determination was not made until this proceeding was concluded. And reliance by SFPP in this case would have been entirely unrea-

sonable, in the face of FERC's repeated statements that no final rate had been set because rate issues remained outstanding and FERC's acceptance of each compliance filing subject to investigation and further orders. Indeed, the alternative to the interim orders in this case would have been a huge reparations order, with interest, at the end of the entire case, which would have left SFPP in exactly the same ultimate position as did the instant proceeding. Therefore, the "fairness considerations underlying the *Arizona Grocery* rule" (Pet. 17) are not implicated here.

The decisions of this Court applying *Arizona Grocery*, cited by SFPP (04-903 Pet. 12), support the decision of the court of appeals in this case. *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975), approved the ICC's practice regarding general revenue proceedings, in which the ICC permitted an across-the-board rate increase based upon cost increases applicable to all or most railroads. *Id.* at 311-314. Just as the interim decisions in this case did not prescribe a final lawful rate, the Court found that the ICC's approval of the across-the-board rate increase in *Aberdeen & Rockfish* did not prescribe a final lawful rate with regard to any carrier within the meaning of *Arizona Grocery*. *Id.* at 313. Accordingly, just as in this case the Commission remained free to order reparations upon the conclusion of the proceedings, the Court held in *Aberdeen & Rockfish* that, notwithstanding the ICC's approval of a general revenue rate increase, shippers were free to challenge individual rates and obtain refunds in complaint proceedings under Sections 13 and 15 of the Interstate Commerce Act. *Id.* at 313. Because it too recognized that agency-prescribed rates may sometimes be subject to challenge and reparations, *Aberdeen &*

Rockfish supports the court of appeals' decision. See also *ICC* v. *Inland Waterways Corp.*, 319 U.S. 671, 686-687 (1943) (finding that the ICC resolved only petitioners' right to proportional rates, and did not otherwise approve or prescribe the carrier-proposed rates, which left rates open to reparations).[7]

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[7] SFPP's contention (04-903 Pet. 13 n.10) that the court of appeals' decision is contrary to earlier D.C. Circuit decisions is also mistaken. The cases SFPP cites stand for the proposition that refunds cannot be awarded with regard to previously-approved rates. See *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182, 189 n.7 (D.C. Cir. 1986) (precluding refunds based on post hoc determination that filed rate was illegal); *United States* v. *Davidson Transfer & Storage Co.*, 259 F.2d 802, 806 (D.C. Cir. 1958), rev'd on other grounds *sub nom. T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959) (filed rate determined to be reasonable is a lawful rate subject to *Arizona Grocery*). As the interim rate orders here did not prescribe just and reasonable rates, those cases are inapposite. The D.C. Circuit has, in fact, expressly upheld an agency's authority to issue interim rate orders as decisions are reached as to particular rate elements. *Nader* v. *FCC*, 520 F.2d 182, 202-205 (D.C. Cir. 1975) (holding that, consistent with *Arizona Grocery*, FCC could lawfully issue a rate order based on a determination of the carrier's rate of return, notwithstanding that a number of other rate issues remained pending). In any event, further review would not be warranted to resolve an intra-circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CYNTHIA A. MARLETTE
General Counsel
DENNIS LANE
Solicitor
LONA T. PERRY
Attorney
Federal Energy Regulatory Commission

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